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In the Supreme Court of the United States

George S. Whitaker,
Plaintiff in Error
vs.
Thomas McBride and William Kilgore,
Defendants in Error

No. 135.

Error to the Supreme Court of the State of Nebraska

Brief and Argument of Plaintiff in Error

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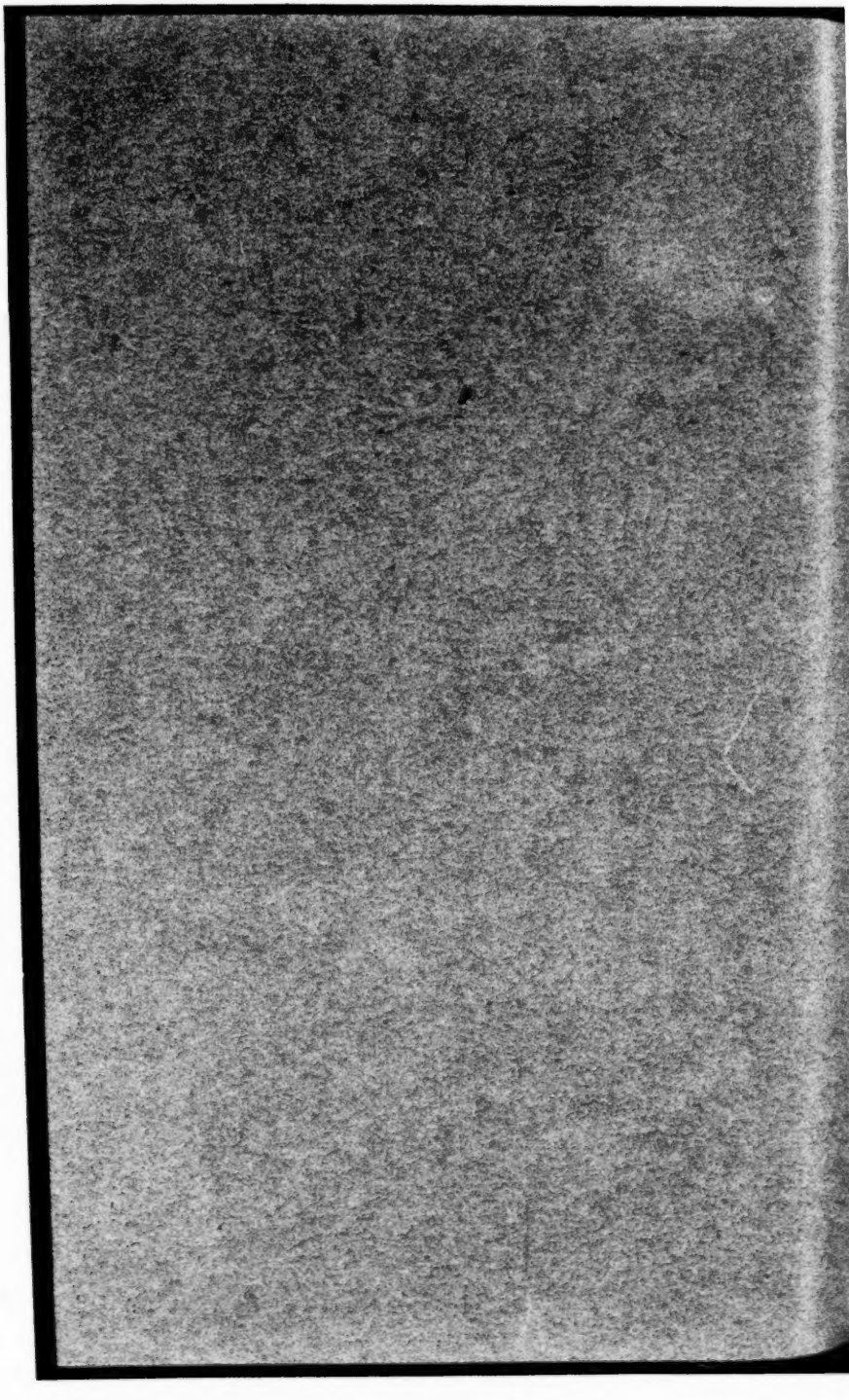

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This is a proceeding in error to reverse a judgment of the Supreme Court of the State of Nebraska, awarding possession of the matter in controversy to the defendants in error. The matter in controversy is an island in the Platte river belonging to the United States, but which plaintiff in error seeks to occupy and own as a homestead. At the point where the island in question is found, the Platte river is about *two miles* in width, measuring the *land* as well as the *water*, and it consists of *numerous small channels* and *numerous islands*, some of which are quite extensive in size. These islands are sometimes rather wide, but they are often narrow and they are gen-

erally of considerable length. They are very productive and consequently valuable. The *particular island* in question was used by Whitaker as a market garden where he raised onions, beets, sugar corn, cabbages and all kinds of garden produce, the susplus over and above what he needed for his family, he sold in the market. He had also planted a small orchard. He lived upon the island with his family. He continued to so use the land until he was *put off the premises* under the decision of the Nebraska Supreme Court. He sought to enter the island as a homestead. The Platte river is very shallow. Its average depth in summer, except during the June rise, is *not more than six inches.* The island in controversy, in common with the other islands in the vicinity, has probably been *in existence hundreds of years.* Because of the shallow water in the river, the river does not change its course rapidly, or change the formation of the islands. All is seemingly stationary. The water in the numerous channels would probably measure a mile in width. The united width of the islands would be about the same, except in some places much wider.

This island is part of the Fort Kearney Military Reservation. The Act providing for the survey and sale of that Reservation is a local act passed in 1876 and contained in the nineteenth U. S. Statutes at large, at page 94. At the time this act was passed many settlers had *already gone* upon the reservation and many more *were going upon it* and *were expected to go upon it.* Congress passed this local act to *protect such settlers* who were making and expected to make such settlements. Whitaker is a qualified homestead entryman, and belongs to the class expected to settle. Our contention is that Congress intended to *encourage settlement* upon this *particular Reservation*, and that Whitaker is therefore entitled to the protection which the Act gives him. Whitaker settled upon *unsurveyed government* land. All parties concede that

this *island is unsurveyed.* It is claimed by our adversaries that Whitaker could not make a lawful settlement and could not obtain any right to the possession of the island because McBride and Kilgore had each purchased a part of two *other* islands which were separate and distinct from this island, and one of which was on the north side of this island, and the other of which was on the south side of this island. Their contention is that if one purchases an island from the government, or a part of an island, that he has also purchased the island *next to him,* although the government has *not* sold it to him nor in *any way described it in his grant.* Our contention is that the government only sells the island which it describes in the grant, the particular island, and that it does *not sell another* island which is *unsurveyed* and *not described* in the grant. The island which Whitaker settled upon is only *one* of *many unsurveyed* islands in the Platte river within the Fort Kearney Military Reservation. By actual measurement it contains 47 acres and some hundredths. In the immediate vicinity of this island are *many other islands* which are *also unsurveyed.* Some islands have been surveyed and sold to actual settlers *since* the original survey, but there is a great effort upon the part of those who made the first purchases of land on surveyed islands to *claim also the unsurveyed islands.* They seem to hope to control congressmen and thus to prevent *any more* surveys being made, and so to keep *additional* settlers out. The men who made the first purchases on these islands in the Platte river were cattle men, and they seem to consider that they own *all* the land, that which belongs to the government and is unsurveyed, as well as that which they have purchased from the government and which has been surveyed and granted to them.

Most of these unsurveyed islands contain sixty to one hundred acres; some of them more. Because of their exceeding productiveness they are worth from forty to fifty

dollars per acre. There may be *fifty* of these unsurveyed islands within the Fort Kearney Military Reservation, but whatever the number may be our contention is that they *belong to the government of the United States*, and that they are *subject to settlement* by qualified homestead entrymen, and that *only the United States* may put settlers off when they have once settled upon these lands, and that the government of the United States seeks to PROTECT these settlers and to furnish them with HOMES instead of driving them out.

When the original survey was made there was an omission to survey the island heretofore mentioned. It was, probably, very unpleasant to cross these channels when they were filled with ice water in the early spring months at the time the survey was made. The instructions from the Land Department to the surveyors who surveyed the Fort Kearney Military Reservation were to survey *all* islands of *twenty-one acres and upwards.* Notwithstanding these instructions *many* of the islands were *not surveyed.* Some of these islands contain as much as one hundred and twenty acres of land. It was contended by counsel for McBride and Kilgore who cooperated together that if any of these islands were unsurveyed then that the fact that they were unsurveyed distinctly disclosed the purpose of the government to *abandon* the islands. Our contention is that the fact that the government surveyors did not survey the island does *not* show that the government *abandoned it* or that it had *any intention to abandon it.* That the island was not surveyed simply proves that it was not surveyed. *Why* it was not surveyed is not shown by the *fact* that it was not surveyed. The Nebraska Supreme Court Commissioner who wrote the opinion of the Supreme Court draws the conclusion, first, that the land was *abandoned* by the government because it was *not* surveyed; and then draws a second con-

clusion that it was not surveyed and was abandoned because it did *not contain twenty-one acres of land.* The mere failure to survey warrants neither conclusion. That the land was not surveyed may be accounted for upon *any number* of reasonable hypotheses *other* than the fact that the government *had abandoned it.* The Nebraska Supreme Court Commissioner bases his opinion on *circumstantial evidence.* Jones on the Law of Evidence, Sec. 901, states the rule concerning circumstantial evidence as applied to criminal cases thus:

> The circumstances proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused." U. S. v. Martin, 2 McLean (U. S.) 256; Williams v. State, 41 Texas 209; People v. Dick, 32 Cal. 213; United States vs. Douglas, 2 Blatch. (U. S.) 207.

First, of course, the surveyors may have intended to return and finish the survey, but (a) they forgot it; (b) or were retired from office before they returned; or, (c) something else happened which prevented their return: Second, Or at the time they made the survey they may have found the channels covered with ice water, and so disagreeable a job they deferred finishing up until *a future time,* and then they may have been sent somewhere else: or, they may have run out of provisions; or they may have got sick. That the *survey was not finished,* simply proves that the *survey was not finished.* As we understand it the meander line on the north of the island is part of the time north of the stream or streams that surround the island on the north side, and part of the time south of them. We think it is proper to remember that a meander line ought *never* to cross the stream which it meanders. It should also be remembered that in *any event* the islands extend to the *actual line* of the *stream* sought to be meandered, and there is no variation from this rule. Therefore the south side of lot 7 extends down to the stream on the north side of the island, but it can-

not extend beyond it. This lot 7 is bounded by the stream on the south side and not by the meander line, because the *meander line* never *fixes the boundary.* It only serves as a *means of measurement.* Lot 6 which is on the north side comes down to the channel intended to be meandered. It cannot extend *south* of that *channel.* But it is not bounded by the meander line because that is *never intended* to be a *boundary.* Lot 8 which is on the south side of the island extends *north* to the *channel* which runs on the south side of the island, but it cannot extend *beyond* that channel. It cannot extend beyond that channel for the reason that the *actual channel* is *always* the *boundary* and *not* the *meander line* which is simply made for the purposes of measurement. Sphung v. Moore, 120 Ind. 356. It is true the meander line made with reference to the *south channel* crosses the channel and crosses a part of the island land, but lot 8 cannot cross the channel and extend up to this meander line. The meander line as shown by the testimony, was put there by guess. But whether it was or not *no one may dispute* the *actual boundaries* of the island. The *boundaries determine the limits.* The rights of the parties are shown by the *actual boundaries, by the actual stream itself.* The opinion of the learned Nebraska Supreme Court commissioner shows that his idea is that Whitaker desires to dispute the meander line. *There is no such purpose.* The rights of the parties are fixed by the *actual channels with the water in them.* It is the *actual boundaries* which determine the extent of each island including the island in controversy. The meander lines in this case, whatever they may be, do not extend beyond the island purchased by Kilgore or beyond the island purchased by McBride. The island in question is *unsurveyed* and *has no meander lines.* If there is no survey beyond the lots in question owned by McBride and by Kilgore respectively then McBride and Kilgore *cannot get our is-*

land because the survey fails to make it any part of their lots.

This case was originally tried in the District court of Buffalo county, Nebraska, on the 15th day of February, 1899. That court taking the case under advisement rendered its judgment on the 13th day of June, 1899, as follows:

Findings of the Court.

"June 13th, 1899:

The court finds that the plaintiff McBride at the beginning of this suit was the owner of lot 8 in section 12, township 8, range 15, in Buffalo county, Nebraska. That he made the original entry therefor and obtained title to the same by United States patent, and has been in the open and notorious possession of the same for 15 or 20 years.

The court further finds that the defendant W. H. Kilgore at the beginning of this suit and for a long time prior thereto was the owner of lots 6 and 7 in said section; that he became the owner of the same by virtue of a deed to him from the original patentee of said tract, and that he had been in possession of the same for more than ten years prior to the bringing of this suit.

That said tract of land, with other land, was within the extreme channels of the Platte River; and that lying between lots 6 and 7 on the north, and lot 8 on the south, was a tract of land in said section 12 of about 22 acres entirely surrounded by certain channels in the Platte River, and which is the tract of land in dispute herein.

That the government surveyor when originally surveying said lots 6 and 7 did not actually survey the meander line forming the south line of lots 6 and seven as they were required to do; but that instead of making an actual survey of said meander line along the said channel bordering on said lots 6 and 7, they falsely show upon the map made by them that they had done so, and located upon said plat what they supposed to be the true meander line of said lots 6 and 7. That they never made an actual survey of

the north meander line of said lot 8, but indicated upon the plat made by them what they supposed was the meander line of said lot 8. That they never actually surveyed the meander lines of said tract of land lying between lots 6 and 7 on the one side and lot 8 on the other, and which tract is spoken of in the evidence as an island, but that they indicated upon the plat the general outlines of said island as they understood it to be.

The court further finds that said channels bordering said tract in dispute, the one being on the south of lots 6 and 7 and the other on the north of lot 8, are substantially the same now as they were at the time the original survey was made, and that said channels are substantially as shown by the plaintiff's plat marked plaintiff's exhibit "A" offered in evidence.

The court further finds that the defendant Kilgore at all times since he became the owner of lots 6 and 7, claimed to be the owner of the tract in dispute as part of his said lots 6 and 7; that such claim had not extended over the period of ten years at the begining of this suit; that he had possession during a part of the time of said claim of all of said tract and all the time a part of said tract.

That McBride, ever since he received his final receipt to lot 8, has claimed to be the owner of a part of said island. That they together have had the title to lots 6 and 7 on the one side and lot 8 on the other, and have had possession of the island for more than ten years prior to the bringing of this suit, but that they were contending between themselves during said period as to what part of the island each should have and did not agree.

The court further finds that the south line of said lots 6 and 7 is the channel shown in Exhibit "A" and that the north line of said lot 8 is the channel bounding it on the north as shown in said Exhibit "A."

As a matter of law the court concludes that said island should have been surveyed by the government surveyor; that it was a neglect of duty on their part to not survey the same. That the title to said island still remains in the United States. That it was never the intention of the goverment at the time it gave the patent to said lots 6 and 7 to convey any part of the island, nor

was it the intention of the government to convey it to the patentee of lot 8

The only interest that defendant Whitaker has in said land is that he claims the right to enter the same as a homestead, and that his right is only what possession would give him, and that he has no right thereto.

The court further, concludes as a matter of law, that the government is not bound by the failure of the surveyor hired to do this work by his neglect to perform his duty, and that his failure to actually survey said island did not thereby give the parties to whom the government granted the land on either side thereof any right to it."

The plaintiff in that case offered in evidence his patent to the land south of the south Mosquito Channel (There are two mosquito Channels and some times more. These channels are called by the one name 'Mosquito Channel.' They are a part of the Platte river.) There was no dispute about the fact that the plaintiff McBride was already in the full enjoyment of all the land that his patent called for. Kilgore, in that proceeding, was made a defendant. He offered in evidence his deeds to the lands north of Mosquito Channel. There was no dispute about the fact that he had all the land which his deeds called for. McBride and Kilgore are not endeavoring to regain something that *they have lost* or something they are entitled to under the evidence, but they are endeavoring to invoke the doctrine of Riparian rights *against the United States*, and to claim that they have the right to take *one* island because they own parts of two *other* islands which they purchased from the government. The island which they attempt to appropriate and divide up among themselves, begins *above their lots* and *extends below them*. The Nebraska Supreme Court reversed the judgment of the District Court of Buffalo county and directed the appropriation of the island occupied by Whitaker and its division between McBride and Kilgore.

When the mandate went out to the District Court of Buffalo county to enforce the judgement of the Supreme court, McBride and Kilgore were met with the proposition that the defendant Whitaker had resided on the land continuously since the former trial and that he had made an application to the land office at Lincoln to permit him to enter the land. There was an effort to get these facts *before the trial court.* The trial judge would listen to no showing of *after acquired rights.*

It is our contention in this case that the state courts were absolutely without jurisdiction to invade the domain of the Land Department of the United States, and *that any judgment or decree rendered by the state court was void for want of jurisdiction of the subject matter of the controversy.* But whether void or not in any event the judgment of that court and all proceedings under it to enforce the same, are erroneous. Under the decision of the Supreme Court of the State of Nebraska Whitaker was *arrested and forcibly taken from the premises, fined and put in jail.*

1. We claim that the judgment of the Nebraska Supreme Court and the proceedings thereunder were without jurisdiction because they attempted to take the possession of property *belonging to the United States from the possession of one man and give it to another, and that this was an invasion of the Land Department of the United States.*

2. We further claim that the state Supreme court *exceeded its jurisdiction,* for that the opinion prepared by its Commissioner conceded that the island in controversy had *never been surveyed* and that it was the property of the United States, but held that until the United States *asserted its title* to the island, that it would *take the possession of the island from Whitaker and give it to McBride and Kilgore.*

3. Whitaker also claimed that under the local Act of

Congress authorizing the settlement and disposal of the Fort Kearney Military Reservation and its survey, that he was rightfully in possession of the island, and that it was the duty of the Land Department of the United States to survey the island and to allow him a homestead receipt and patent.

Under the homestead law at the time the evidence was taken in 1899 and the first judgment rendered, Whitaker was only entitled to possession. He was not entitled to make final proof, but at the time the case was heard under the mandate issued by the state Supreme court in June, 1903, four years after the original trial, Whitaker *was entitled* to make final proof under the laws of Congress, which had been amended in the mean time, and was entitled to his patent by reason of the amendment, by reason of his continuous residence and by reason of his improvements and his successful and unremitting cultivation of the soil. He had finally performed the service required of him. He was an American citizen. He was entitled to the reward of American citizenship. He was entitled to the fee of the island which he had converted from an unproductive waste where the coarse grass and rough and scrubby brush grew in rank confusion together to a farm with smooth fields of meadow and yellow grain, and a garden and an orchard where the vegetables and the flowers and the fruits yielded up their willing tribute to the busy hand of intelligent industry. He had won his home for his wife and little ones. He was the *first settler on this island*, and under the Act of Congress of 1876 which gave him the right to *settle* upon it whether it was surveyed or not surveyed, he had the right to go on this island and to hold it forever and ever. It would seem to be the duty of the National government to protect him in his settlement and to give to him all that he is entitled to by reason of his faithful occupation of the premises. Whitaker has found a home and it is a part of the public

domain, and the people of the whole United States, speaking through their representatives in Congress assembled, have declared that Whitaker is entitled to this land.

Ordinarily there can be no legal settlement until the land belonging to the United States *has been surveyed* but the purpose of congress, in this instance, was to make a settlement *legal without any survey*, and to protect the possession of those who went upon the land *before it was surveyed.* It was also the purpose to permit no homestead entry to be made unless there had *first* been an *actual settlement* upon the land. Congress made *actual settlement* a *prerequisite.* Because of this fact no land could be disposed of by the government unless to an *actual* settler. Whitaker was the *first* actual settler upon the island which he occupied until the state court drove him off of it. Therefore his *possession* is entitled to *protection* and this is independent of *any survey being made.*

I.

The stream between two islands is the natural boundary and neither islander can own farther than to the *center* of the *channel* between him and his immediate neighbor islander. This is elementary and no one disputes it. But the trouble with the Nebraska Supreme Court Commissioner was, that he seems to have *misunderstood the fact.* He seems to have thought that McBride and Kilgore owned lands coming down to the *outside shore.* He forgot that *they were islanders.* McBride and Kilgore claim that they or their grantors acquired the title. They claim that they acquired the title because they or their grantors acquired title to the center of the "channel" and they claim that the "channel" included all the streams designated by the common appellation "Mosquito Channel." To this we *say that calling two* or *more separate* things by *one name* does *not lessen the*

number of things; the number of things remains the same. If there is one channel between the shore and the island,it is one channel, although the channel on the other side of the island may be called by the *same name*. We say, therefore, that in no event can Kilgore hold title *beyond* the center of the *first* channel *next* to his lots; nor can McBride hold title beyond *the center* of the *first* channel *next* to his lot. This leaves the island free as to them in any event. But Kilgore is an *islander* and he can claim *no greater right* to Whitaker's island than Whitaker can claim to his island because both are islanders. What is true as to Kilgore is true as to McBride. One islander does not own *another islander's island*. The stream between the *two* islands is a *natural* boundary and neither islander can own farther than to the center of the channel. If the stream is navigable then the bed of it belongs to the state, except insofar as the United States may exercise control over it in the interest of commerce and navigation. In that event the owner of the shore owns only to the high-water mark.

II.

The Platte river is an inter-state stream. While it is very shallow yet, because of its exceeding width, it has been treated as a navigable stream. It is *meandered*. In theory it is a navigable stream. If the analogy holds good all the way through, then Kilgore owns no part of the channel; McBride owns no part of the channel. He only owns to high-water mark, just the same as if he owned land on a stream *actually navigable*. The state would therefore own the bed of the Platte river, and each islander would own to high-water mark and no farther. In the opinion delivered by the Nebraska Supreme court the learned Commissioner who wrote it, seems to entertain the idea that the state owns the bed of the Platte river. McBride v. Whitaker, 90 Neb. 966; and he is very

careful not to say anything which may be construed to preclude the state from also claiming the unsurveyed islands in it.

III.

One of the features of the Act which entitles it to special consideration is that while it permits the occupation of the land *before it is surveyed*, yet it does provide that the land *shall not* be offered for sale *until it is surveyed*. It must, therefore, be conceded that it could not be legally offered for sale while it was not surveyed, but at the same time it could be legally settled upon. Because the Act provides that the land shall not be offered for sale *until* it is surveyed the commissioner of the general land office was forbidden to offer it for sale, and could not legally sell it until *after it was surveyed*. *He* could *not sell it* nor could McBride or Kilgore *purchase it*, nor could either of their respective *grantors purchase it*. For this reason the owners of the surveyed lots in the immediate vicinity *were forbidden* to acquire title to the island because it was *not* surveyed. If the island in question could not be *sold until surveyed* then it has *not been sold because it has not been surveyed and no one has any title to it*. Horn v. Smith 159 U. S. 40. These islands ought to have been surveyed because it was according to instructions that they should be surveyed. Because they ought to have been surveyed it does not follow that a patent for the surveyed tracts carries with it the unsurveyed tracts. In the case of Horn v. Smith above cited the land unsurveyed was between a bayou and the river. The court said: "The patent conveyed only the land which is surveyed, and when it is clear from the plat and the survey that the plat surveyed terminates at a particular body of water, the patent *carried no land beyond it*."

IV.

The case of the Indiana R. R. Co., v. Butler, 159 U. S. is referred to by our adversaries as decisive of the law pertaining to the merits of this case. In that case the islands were in the main channel of Grand river. Four of these islands were surveyed at the time the *main land was surveyed.* About these four islands there was no controversy but the fifth island was the island of dispute. There was testimony in the case which tended to show that it was *not an island* at the time of the survey but a *mere speck of sandbar* which was covered by water most of the year. Grand river is a navigable river. Because the general government surrendered its control of the bed of the river to the state of Michigan upon the creation of that state, it could not therefore own the island if the island were *not in existence* at the time of such creation. There was no showing sufficient to establish the fact that the island was in existence at that time: therefore there was no evidence that the government *owned an island.* Unless the island was in existence at the time the *state was created* it could not be the property of the government, because at that time the *state became the owner of the bed of Grand River,* and if the island grew up *after that* time, the general government *could not have title to it.* And unless the government had title to the island it had nothing which it could convey to the railroad company; and the railroad company received nothing by reason of the conveyance. Michigan extends the rule of the common law concerning the rights of the shore owners to hold to the thread of the stream as to navigable streams but this does not conflict with the general government because the general government always surrenders its control of navigable waters to the state *as soon as the state is organized,* except that it retains a certain sort of control in the interest of commerce and navigation. As we

understand the rule it is this: Under navigable waters, the United States owns all the land by virtue of its sovereignty in trust for the people, but when the United States permits the formation of a new state it surrenders its sovereignty over the land under navigable waters to the *new state* except insofar as it may be necessary to maintain control over it for the *regulation of commerce.*

V.

No rule may be adopted by any state which shall take from the United States its property *without its consent*, and, therefore, whether it is upland or land under unnavigable water, it is not to be taken as disposed of unless there is the *clear intent* of such disposal manifest from the language of the conveyance by which the United States divested itself of its title.

VI.

Nebraska is forbidden by the "Enabling Act" to interfere with the primary disposal of the soil." For this reason it could adopt no rule concerning the bed of the streams that were navigable which would in any way interfere with the *sale of the public domain across which these streams run.*

VII.

It is clearly within the power of the Secretary of the Interior and the Commissioner of the General Land Office to direct the survey of the island in question—Kirwin v. Murphy, 23 Sup. Ct. Rep. 599.

VIII.

The United States owns the island.—United States v. Mission Rock Company, 23 Sup. Ct. Rep. 606.

IX.

There is no specific finding in this case that the United States has *abandoned* the island, nor does the Nebraska Supreme court find that the United States may not convey the island to *Whitaker* or to *any other person who may claim it.*

The Nebraska Supreme court has recently said: "Not until the legal title has passed from the United States will the courts inquire into the circumstances preceeding or attending the transfer for the purpose of deciding which of two conflicting claimants have the superior equity."—Henry S. McDonald v. U. P. R. R. Co., opinion delivered November 18, 1903, 97 N. W. 440. Notwithstanding this decision the effect of the action of the Nebraska Supreme court is to take possession of land *from Whitaker* and to *give* it to his adversaries. The above statement of the Nebraska Supreme court is fully justified.—Skefley v. Coman 91 U. S. 330; Rector v. Gibbon 111 U. S. 290.

X.

We contend that Whitaker may not be deprived of a lawful right because a *mere surveyor refuses* or *neglects* to *discharge his duty.*

When Congress directed the survey of the Fort Kearney Military Reservation it was the duty of the surveyors to survey it. All islands containing 21 acres or upwards should have been surveyed. By failing to survey this reservation the surveyors did not, certainly, exercise *judicial* functions. It being conce led that a surveyor cannot exercise judicial functions, it would seem that he cannot deprive the United States government of its property by *wilfully refusing* to act or by a *mere mistake.* If it shall be said that if the action of the Commissioner of the General Land office must first be favorable to the claim of

Whitaker and that Whitaker must first be allowed a homestead entry before he can get a patent, then we say that the land officers are never permitted to *determine the law of the case.* They are permitted to determine what the facts are between contesting claimants, but the United States courts most jealously reserve to themselves the right to *determine the law.* This being true it is for the United States courts to say (this court now) whether the Act of Congress providing for the survey and disposal of the land included within the Fort Kearney Military Reservation invested Whitaker with the right to occupy the *island in question,* and whether that act contemplated that by reason of *such occupation* he would be *entitled to the land.*

It may be that the United States Supreme court couldn't compel the Secretary of the Interior and the commissioner of the General Land office to survey lands and issue homestead receipts,but where there is an island within certain prescribed boundaries whose limits may beknown and which is *lawfully occupied* and which formerly belonged to the public domain and to which island the settler has obtained *certain legal rights* by reason of his settlement his continuous occupation and his compliance with the Act of Congress, we trust that the law will protect him in the right which he has acquired, and that it will prevent him from being "ousted" whatever may have been the negligence of the surveyors. We hopefully assert that if the Act in question authorized Whitaker to settle upon the island, then nobody but the United States of America can put him off.

XI.

We are aware of the contention that when the government desires to do so it will *do this* and it *will do that.* To this we say that the government is an intangible

thing. *The government is not in the flesh or in the spirit.* It has no volition of its own except as that will is expressed by its *servants*, its *agents* and its *officers*. The government is apathetic and never, until some one speaks up for it, does that which the people desire to have done. In this case there will be no hesitation to act as soon *as this court* shall declare what ought to be done. It is because of a misunderstanding of the views of this court that fifty to a hundred settlers are not provided with homes on the unsurveyed islands in the Fort Kearney Military Reservation. Courts do not assume the administration of the public land laws but they may declare their effect. Kirwin vs. Murphy, 23 Sup Ct. Rep. 599.

XII.

Our contention is that it is impossible for one to be a trespasser who attempts to claim land from the government by *occupying* it and who is *honestly* trying to obtain title to it under a law which looks to the *making of a settlement upon it.* The general policy of the government is in favor of the occupation of public lands to the end that they may be *taken for homes.* The opinion in this case concedes that the claim of McBride and the claim of Kilgore are each *illegal* so far as the *government is concerned.* The government is authorized, as the opinion declares, to convey the land to *any other person* or *persons*, or it may assert *its own right to it*, but *Whitaker* is to be treated as a *trespasser.* To this we say that their possession is illegal and their judgment is illegal and they *are trespassers as to the United States government.* Now, then, the practical question is whether this court will come to the rescue of *Whitaker* and all *others who are situated as he is situated.* In Koon v. Freels heirs, 16 Land Decisions 202, it was held that illegal possession by another party does not render a homestead entry invalid because such

possession existed at the date of the entry. In Leon v. Grijalva, 3 Land Decisions, 362, there was a settlement on public lands before the government survey was made. A little settlement established itself upon the banks of Mimbras river in New Mexico. Each settler had possession of a small strip of land extending back from the river. These people were squatters *seeking homes in a new country.* They built a public ditch to enable them to irrigate the tracts which they occupied. Two of their number built a mill. After the government survey was made, Grijalva undertook to obtain title to the land occupied by these people. *He wanted their ditch and their improvements and the land which they occupied.* He claimed the land under the United States homestead act and made proof and the local Land Office sustained his claim. The decision of the local Land Office was reversed by the Commissioner of the General Land Office who made an order that the contestants who had contested Grijalva's claim should have the preference right of entry for thirty days for so much land by legal subdivisions as might be in his actual occupation or free from the occupation of others, but would have no more rights than Grijalva had to enter any portion of the land occupied in good faith by others having their homes and improvements upon it, and claiming the same for their own exclusive use and benefit and who desired to enter the same under the public land laws. This decision very properly undertook to protect the *possession* and right of each settler to obtain title to the tract occupied and improved by him. The *principle* established in this case will give Mr. Whitaker the island.

In the case of Francisco v. Mirabel, 21 Land Decisions, 341 there was a village on the land homesteaded. The homesteader agreed to convey to each villager the land occupied by him. His entry was attacked on the ground that it was speculative and not within the provi-

sions of the statute because not made for his own exclusive use and benefit. The Secretary of the Interior sustained the entry thus showing the policy of the government to protect *the homes of all who seek to avail* themselves of the *bounty of the general government.*

Another case showing the same policy upon the part of the government is the case of Brown vs. Shields 21 Land Decisions, 101. In that case Shields had married an Indian woman and had lived with her upon the land in dispute in the Indian territory. Subsequently, when the land was opened for settlement under the Act of Congress he made a homestead entry upon the land which he occupied. Brown attacked his right to hold the land as a homestead upon the ground that he had occupied the land contrary to the inhibition in the Act of Congress and between the second day of March, 1889 and noon of the 22d day of April, 1889. Two other white men were similarly situated. They had also married Indian wives and had occupied and farmed land in the territory. The Act of Congress *excepted no one.* The Act provided that no one was allowed to occnpy the land in the inhibited district during the time above specified It was contended with great force that the Act of March 2, 1889, relative to the Oklahoma lands was operative on all alike and that the Act of Congress having made no exception in favor of any one, neither the Commissioner of the General Land offiee nor the Secretary of the Interior had any right to make any exception of this contestee, Peter Shields, and to hold that he and Benjamin Keith had rights superior to other white male citizens of the United States was to rise above the equal action of the law and to hold that a "squaw man" obtained by his marriage to an Indian woman greater rights than belonged to the plain unvarnished citizen who had been unfortunate enough to marry a white woman. Notwithstanding the seeming logic of this argument the Secretary of the Interior protected the homes of these

white men married to Indian wives and they were *allowed to hold the lands.* They were exempted from the operation of the *strict letter* of the law because of their previous residence on the land. In that case the Secretary cited numerous decisions.

XIII.

McBride and Kilgore had no lawful right *to fence up this land belonging to the United States.* The settlement made by Whitaker was lawful. In Stoddard v. Neigel, 7 Land Decision, 340, Neigel drove his wagon through the fence and went onto the land and lived in the wagon with his family until he could build a house. He offered to file a declaratory statement but his application was refused because the land was unsurveyed. It was urged on behalf of his adversary Stoddard that under the doctrine laid down in Atherton v. Fowler, 96 U. S. 513 "No rightful possession of the premises can be established by a settlement and the improvement on a tract of public land where the claimant forcibly entered upon the possesssion of one who had already settled upon improved and enclosed that tract." It was claimed that this doctrine invalidated Neigel's settlement. The Secretary held that this doctrine *did not apply* and that Neigel had a *right to drive through the fence.* If we apply the same doctrine to the case at bar, as the land belonged to the United States and is conceded to have belonged to the United States by the opinion of which we complain, then Whitaker had a *right* to go on the land and to build his dwelling house there and had a *right* to farm the land and to raise his children there. In any event McBride and Kilgore *did not own the island.* And the error of the Nebraska opinion is in assuming that McBride and Kilgore were entitled to the use of the land without owning it.

In Norton v. Westbrook, 9 Land Decisions, page 455 Norton had not only fenced the land but he had cultivated

50 acres of it, yet he was not entitled to it and the land was awarded to Westbrook.

Stovall v. Keenan, 12 Land Decisions, 382; Cartran v. Davis, 2 Land Decisions, 250.

The United States would seem to discourage the *unlawful enclosure of* lands which do not belong to those who *thus attempt to take and use them.* It would seem to be the right of any one who may be qualified to make a homestead entry to drive through the fence and occupy the land where one has *unlawfully usurped it.* He is entitled to make a *home for his family and himself.* The option of the Nebraska Supreme court does not determine that the United States government is barred by the trial of the case and does specifically determine and declare that any *future grantee* of the government may take title to the land; at the same time that it says this, IT FORCIBLY PUTS WHITAKER OFF OF THE LAND.

The decisions from which we have quoted shows the method of the government in doing business. They can only be valuable to this court because of the fact that they *show such Method.* These decisions, however, *come from the people.* They are not statements of law. They are simply *methods of doing business.* But they show that it is the *political policy* of the government to protect settlers in good faith who endeavor to *establish homes upon the public lands.* In Grand Rapids & Indiana R. R. Co., v. Butler, 159 U. S. 87, the court said:

"We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyors to decline to survey this particular spot as an island. There is nothing to indicate the mistake or fraud and the government has never taken any steps predicated on any such theory as that, and did not survey the so-called island No. 5 until 25 years after the survey of 1831, and nearly 20 years after that of 1837. The Supreme court of Michigan was right in holding that what-

ever there was in this conformation passed under the grant to Lyon and Hastings."

It will be remembered that Lyon and Hastings were owners of the main land coming *down to the shore.* It will also be remembered that in Michigan, although the streams are navigable the rule is that the owner owns to the *center of the channel.* Now, this so-called island at the time it was surveyed 25 years after the original survey, only contained 2.56 acres. It was utterly *insignificant in size.* It was in a stream of depth and volume where there was every likelihood of a change in its conformation by reason of the *strength* and *depth* of the current. In that case the surveyor was instructed to survey "islands." This was not an island because it was a *sandbar covered with water the greater part of the year.* But in the case at bar there are no changes in the formation of the island and this island contains nearly 48 acres. It was not a speck of *sandbar* at the time of the survey, and it was just as it is now, and it has always been *good agricultural land.* In the Michigan case as the owner of the *shore* land owned the *bed* of the *river* to the *center* of the *channel* he would own any island that rose above the surface *after* he obtained his title. There is nothing whatever of that sort in the case at bar. *This island in the case at bar was just the same at the time of the survey as it is now.* It is not a speck of *sandbar* rising up out of the waves. It is a very substantial island that has probably been there just as it is now for the last *two or three hundred years.*

In Kirwin v. Murphy 23 Sup. Ct. Rep. 599 there was a case in some respects like this except in that case the land department acted, while in this case the land department is slow to act because of the decision of the Nebraska Supreme Court. In that case there was a lake. The plaintiff owned certain fractional lots supposed to ex-

tend to this lake. The plaintiff sought to enjoin the threatened survey of the land between the *meander line of the survey* and the *actual water line of the lake.* The plaintiff claimed that he bought the land for the purpose of obtaining the pine timber growing upon it and that the lake was navigable and that if the surveyor had perpetrated a fraud upon the government in failing to accurately establish the meander line, then that, he, the plaintiff, had not participated in the fraud, and that he owed to the *water line* and regardless of the *meander line.* The Circuit court perpetually enjoined the survey and the Circuit court of Appeals affirmed the judgment of the court below. The United States Supreme Court reversed the decree of the Court of Appeals and the decree of the Circuit court and remanded the case to the Circuit court with directions to dismiss the plaintiff's bill.

If, in that case, there was a right to survey *between the meander line* and the *water line of the lake,* there is a right to survey the island in this case. *In both cases the United States owns land which is not surveyed.*

In United States v. Mission Rock Co., 23 Sup. Ct. Rep. 606 there were two rocks out in San Francisco Bay. The land on the shore had been surveyed and sold down to within less than a half mile of the rocks. Under the rule by which our friends on the other side attempt to claim this island the purchasers of the fractional lots abutting upon San Francisco bay would have been entitled to hold the rocks. They could have claimed the rocks as a continuation of their fractional lots. The rocks had in no way been reserved by the government. Somebody conceived the idea that these two rocks were valuable as a *center* about which to construct a dock. The rocks were conveyed by a private individual who first began the enterprise to a company and many thousand tons of rock were dumped about these rocks until a good landing place

was made. The president of the United States, then William McKinley, made an order *reserving these rocks for naval purposes.* In an action between the United States and the Mission Rock Co., it was finally determined that the United States *owned the rocks* and that it had not parted with its title. It was a fact that the United States had no claim to the land under San Francisco bay. That belonged to the state of California. It could only have been held the United States owned the rocks because there was no *affirmative* evidence in any deed of conveyance that it had conveyed them. The same rule as applied to McBride will confine him to lot 8. The same rule applied to Kilgore will confine him to lots 6 and 7 and it will declare that the island in question *belongs to the United States subject only to Whitaker's right of occupation.*

In Keen v. Calumet Canal Co. Improvement Co. the Canal & Improvement Company brought suit to quiet title in the state court of Indiana. It got judgment (150 Ind. 699; 50 N. E. Rep., 85) and the case was taken to the Supreme court of the United States by writ of error. The Calumet Company claimed title from the state of Indiana and the state got its title under the Swamp Land Act and patents of the United States purporting to be in pursuance of that act, and referring to the official plat of survey made in 1834. The patent set forth: "The whole of fractional section" enumerated and bordering on the water in which section rises the disputed land. It is not denied that the company got the land above the water line as shown in the plat referred to but it denied that it got more. The water had been receding and drying up. The defendants Keen et al, set up a later survey in 1875 of the land which was covered by water in 1834 and is covered to a less extent still, and patent from the United States in pursuance of this later survey for tracts below the original water line. They denied that the state ever owned this land, or, if it did, that it conveyed it and they alleged

the later survey to be conclusive. The court held that the making of a meander line has *no certain* significance. French Glenn Live Stock Co. v. Springer, 185 U. S. 47; 46 L. Ed. 800; 22 Sup. Ct. Rep. 563. It does not necessarily import that the tract on the other side of it is *not surveyed* or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary. St. Paul R. R. Co. v. Schurmeir, 7 Wall. 272; 19 L. Ed. 74; Hardin v. Jordan, 140 U. S. 371; Horn v. Smith, 159 U. S., 40.

In this case its immediate import was only to indicate the contour of the lake Among other things the court said: "The land was settled as swamp and overflowed lands by the state. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so, it was confirmed to the state by the act of March 3, 1857. Chapter 117 (11 Stat. at Large, 251; Rev. Stat. Sec. 14-84, U. S. Com. Stat. 1901, 1588.) The land covered by the water, at least, was surveyed so that the identification of the submerged portion was absolute. We are of the opinion that the state of Indiana got title to the whole land in dispute. If the state of Indiana got title it gave one. The re-survey by the United States in 1874 does not affect the Calumet Company's right; as the United States had already conveyed the land, it had no jurisdiction to intermeddle with them in the form of a second survey. Citing Hardin v. Jordan 140 U. S., 371, and other cases. But it will be noticed in this case cited that the land was selected as swamp and overflowed land. The purpose of the United States was to allow the state to obtain title to these swamp lands and overflowed lands. The court finds that the plat and field notes show that the section and dividing lines were clearly marked off, and posts set, so that whether the land was *submerged* or whether it was *uncovered* made no difference as the purpose was to convey all the land contained in the *section*

enumerated whether submerged or not.

The Circuit court of the United States decided as the United States had *already conveyed* the lands it had no right to intermeddle with them in the form of a second survey. Hardin v. Jordan 140 U. S., 371; 35 L. Ed 428; 11 Sup. Ct. Rep. 808; Grand Rapids & I. R. Co. v. Butler 159 U. S. 87; 40 L. Ed. 85; 15 Sup. Ct. Rep. 991; St. P. & P. R. Co. v. Schumeir, 7 Wall, 272; 19 L. Ed. 74.

But that case is a very different case from this one. In that case it was the purpose of the government to convey all the land within certain boundaries whether surveyed or not, but in this case it was not the purpose of the government to convey *other lands than those surveyed. The island in question was not surveyed.* In the case cited, the purpose of the government was to convey all the land indicated and lying within the *outside* lines of the section without regard to whether the *inside* lines had been run or not, and without regard to whether the land so conveyed was submerged or not. The purpose was to convey swamp and overflowed lands to the state. Because it did not appear otherwise the court held that the selection "must be presumed to have included the land overflowed." The court calls attention to the fact that the section lines and dividing lines were clearly marked off and the posts set.

XIV.

We desire to call the attention of the court to the fact that the island which was occupied by Whitaker is *much longer than the lots to* which McBride and Kilgore seek to attach to it. A part of this island claimed by Whitaker is in section 6 T. 8, R. 16 W., and part in the S. E. quarter sec. 12, T. 8 R. 12, W., and a part in the S. W. quarter of section 12 T. 8 R. 15 W., and a part of N. E. quarter section 13, T. 8 R. 15, W.; and a part in the N. W. quarter 13, T. 8 R. 15 W. It begins *above the McBride and Kil-*

gore lands and extends below them.

XV.

The special Act of Congress which provided for the survey and sale of the Fort Kearney Military Reservation provided tnat *no person* might acquire title to any part of said Reservation unless he *actually resided upon the land.* Whitaker was the *first settler upon this island.* It was never occupied by *any other* settler than Whitaker. As the Act of Congress is a special act and provided that *only settlers* could acquire the land, it was simply *impossible* that McBride or Kilgore's grantors could have acquired title to this island.

XVI.

In Lamers vs. Nissen, 4 Neb. 245, it was held that "the mere fact that it (the meander iine) that is run and designated upon the plat as a meander line is not conclusive against the government." An entry of government land bounded by a meander line does not include land lying at the time between such meander line and the bank of the river. In that case the original survey described the *meander* line as running along the bank of the Missouri river, and no reference was made to any land lying *outside* of the meander line. As a matter of fact the meander line was run along the bank of an *ancient slough* and *not along the bank of the river.* At the time the survey was made the land was *in existence.* In that respect *that case is the same as this one.*

In the case at bar in respect to the things sought to be done by our adversaries, it is not unlike the case of Bissell v. Fletcher, 27 Neb. 582. In that case the plaintiff owned lot 3 in section 31 containing 52.60 acres. He undertook to claim 117 acres more. The Nebraska Supreme Court held "that *a mistake* was made in the *original plat*

of the government survey (see page 586). This seems to have been fully sustained by the evidence. The plaintiff claimed that lot 3 *extended to the river*. From the statement made (there was a rehearing) in the 19 Nebraska, 725, the plat showed "that the S. W. corner of the lot extended to the north channel of the Republican river. There was also testimony tending to show the *meander line* between the river and the south line of said tract." The defendant was the owner of lots 6 and 7 lying south of lot 3 and between it and the river; and the contention of the plaintiff was that lot 3 *extended to the river*. Notwithstanding the fact that lot 3 contained all the land that plaintiff purchased and paid for, he *contended that he owned to the river*. In the second opinion, Judge Maxwell, said that plaintiff "is already in possession of *all the land that he purchased* and that the government sold to him.—2d opinion, 27 Neb., 585. McBride and Kilgore each have *all the land their patents call for*. In this respect they *are entitled to nothing else*, if the Supreme court of Nebraska is to be followed in the case cited.

In Wiggenhorn v. Kountz, 23 Neb. 690 an island in the Platte river was partly washed away. The *upper* part of the island was taken, and there was a sudden formation of land on the *lower* end of the island. Upon this lower end of the island there was a growth of trees. These trees were taken by the defendant Wiggenhorn and by the plaintiff in error. Wiggenhorn, et al were sued by Kountz in the court below *for taking the trees*. They defended upon the ground that the land suddenly formed at the lower end of the island belonged to the parties owning the *main land bordering on the river near said island*." The Nebraska Supreme Court held "in the case under consideration it is clearly shown that there is a clearly defined channel of the river on *each side* between the *main land* and *the island*. The ground of the main land, therefore, would, at the most, merely extend to the *center* of the

thread of the *stream between the shore and the island*, so that in *no event* could an owner of the main land claim an *interest in the island*." Apply this principle.

XVII.

All the parties agree and the evidence shows that the islands are *unsurveyed*. This being true the islands *cannot* be a part of the lots owned by McBride and Kilgore. The boundaries of these lots are determined by reason of the fact that *they are unsurveyed*. The *meander line* is *not* their boundary. *The stream is their boundary*. In this case the plat shows the stream on the *north side* to be *one boundary* and the stream on the *south side* to be *the other boundary*. A boundary is a *natural division* where there *is a natural division*. It is a stream, where the *stream is indicated as the boundary*. *Meander lines* are *not* made as *boundaries*, but they *point* to the boundary and they are made to estimate the surface land from them. Sphung v. Moore, 120 Ind. 356.

In Horn v. Murphy, 159 U. S., supra, Justice Brewer in commenting upon *omission* to make a survey of a tract of land *west* of a bayou and *between the main body* of the Indian river said: "It is unnecessary to speculate *why* it was not made. It may have been a *mere oversight*, or it may have been because the surveyor thought that the action of the water would soon *wash the low land away*; but *whatever* the reason, it is obvious that *no survey* was made of *that body of land*, and the boundary line fixed *was the water line* of the bayou."

XVIII.

In East Omaha Land Co. (Ia. 1900) 90 N. W. 706, the question was whether an island which sprung up in the Missouri river accrued to government lot No. 2. The

court said: "Whether it be on one side or the other of the *thread* of the stream, the island when formed is *an accretion* to the *soil in the bed of the river.* The riparian owner does *not take* the accretion for the reason that it was *not added to his land.*" Hallman v. Hodges 84 N. W. 950; City of Victoria v. Schatt, (Tex. Civil Appeals) 29 S. W. 681; Conley v. Golden, 117 Mo. 33; 23 S. W. 104; 21 L. R. A. 300; Harris v. Brook, 53 Am. Rep. 215; People v. Warner (Mich.) 74 N. W. 705; Indiana v. Kentucky 136 U. S. 479; 10 Sup. Ct. 1051. In the Iowa case, first above cited, the court said that: "The island when formed was an accretion to the soil *in the bed of the river*, and the owner of *such bed* became *the owner of the accretion.*"

In the Missouri case the court said. "It makes no difference in principle that the island in these cases have been surveyed and disposed of by the United States. The riparian owner *would not take the accretion* for the reason that it was *not added* to his land."

While the cases cited in this paragraph are not *directly* in point as to the case at bar there was no question of any accretion springing up in the bed of the river, yet nevertheless these cases establish *a principle* proper to be considered. It is that the owner of the bank *does not own an island* which may spring up in the stream *because he owns the bank.* If the riparian owner owns the island that springs up in a stream, it is because in the first place he owns the land *under* the water to the center of the stream, and, therefore, if an island rises up on *his land* he owns it. But, if the land under the stream belongs to the state, he does not own it. In this case the United States owned the island in controversey. *It was already there.* It belonged to the *United States* as much as *any island on either side of it.* Therefore, when the Udited States sold the islands *on either side* of this island, it simply sold to *the center of the channel next* to the island which it sold. When it sold

to McBride it sold to the center of the channel on the *south side* of the island in controversy. When it sold to Kilgore or to Kilgore's grantors it sold to the *center* of the channel on the *north side of the island.* It did not *undertake to sell* the island which *was not surveyed* and *was not included in the grant to McBride or to Kilgore's grantor.*

XIX.

The State Court has no moral or legal right to attempt to oust the United States Land Department from the discharge of its duties. If it has no *jurisdiction,* then its judgment *is void.* If void it may be attacked collaterally or directly. It affects nothing and creates nothing. It should be considered as if there had never been any attempt to render it, and as if it had never been pronounced or written. Black on Judgments Sec. 170. Freeman on Judgments Sec. 117. The Nebraska Supreme Court does not hesitate to declare *its own judgment void.* Johnson v. Parrotte 46 Neb. 51. Nor does it hesitate to declare the judgment of the district court void under proper circumstances. Banking House of A. Castetter v. Dukes (Neb) 97 N. W. 805. The island *actually does belong to the United States.* The learned Nebraska Supreme Court Commissioner admits the right of the government to *assert title to it* and *to claim it for itself or for any grantee,* but says that between Whitaker on the *one side,* and McBride and Kilgore *on the other,* it is the opinion of the Commissioner, that for the time being and until the further order of the court, or the further order of the United States Land Department, or the further order of the United States Circuit Court, or the further order of some lawful tribunal of the United States assuming to exercise jurisdiction and control over the island in controversy, it *belongs to McBride and Kilgore.* The effect of this decision would seem to be to say, "We *refuse* to consider the question. The land may belong to the United

States and the judgment *may be void*, but even if the land *does belong* to the United States, and even if the judgment *is void*, we are going to give the island to McBride and Kilgore, although the United States may afterwards give it to Whitaker, and we refuse *to say whether our judgment is void.*"

On behalf of the Nebraska Supreme Court Commissioner, who wrote the court's opinion, it is only fair to say that in the briefs filed in support of Whitaker's original contention, there is *no reference* to the local Act of Congress, providing for the survey and sale of the Fort Kearney Military Reservation. But in *any event* the decision is untenable because it permits McBride and Kilgore to recover against Whitaker *without themselves owning the land.* They make the action to *quiet title*, perform the office of an *action of ejectment.*

If this can be done then there must be the same foundation upon which to rest the judgment. This being so they must show title.

"The plaintiff in an action of ejectment must rely for a recovery upon the *strength of his own title* and *not* on the want of title in his adversary." Abbott v. Coats, 86 N. W. (Neb.) 1058; Frazer v. Nelson, (Mass. 1901) 61 N. E. 40; Anniston City Land Co. v. Edmonson (Ala 1900) 30 So. 61; Bert v. Florida (Dec. 1901), 31 So., 265; Winters v. Hainer, 64 S. W. 44 (Tenn.)

An action to recover possession of real property can only be brought by the *holders* of the *legal title.*

Hern v. Jones, 64 S. W., (Tenn. Ch. App. 1900) 344, Sutton v. Clark, 33 S. E., 150; McCrellis v. Wells, 64 S. W.; 293; Remsen v. Hyams, 71 N. Y., 1002; Perrion v. Peck, 60 N. E., 1118, 167 N. Y., 582; Hall v. Morgan, 63 S. W., 506; Robert v. Haines, 38 S. E., 119, 112 Ga. 842, Adams v. Johnson, 65 Pac. 662, Stowel v. Spencer, 60 N. E., 300,

Sanford v. Herron, 61 S. W., 839; 161 Mo. 176, Illinois Steel Co. v. Dillut, 85 N. W., 842, Cowdry v. Johnson, 39 S. E., 478, 113 Ga- 981.

Where the defendant is *in possession of land not under color of title*, the plaintiff cannot eject him therefrom without *showing title* and *right of possession in himself.* McVey v. Cal., 60 S. W., 1034 (Mo. 1901.)

But how can McBride and Kilgore quiet title when they have no title to quiet? How can they quiet title in themselves when the court considers that they *have no title* and that the title is *in the United States*?

In Anniston City Land Company v. Edmondson (Ala.) (1900) 30 So. 61, the court held the following charge to the jury to be correct: "It is a clear proposition of law that to entitle the plaintiff to recover, it must show a better title to the land in dispute than the defendant, and upon this proposition the burden of proof rests upon the plaintiff. And unless the jury can say from the evidence in the case that the *plaintiff has shown a better title* to the land in controversy than the defendant, it is *not entitled to recover*."

In the same case it was held "That the plaintiff must recover on the strength of his own right is also a correct statement of the law."

To the same effect is McLean v. Arends (Ala. 1897) 22 So. 500.

In Burt v. Florida Southern Ry. Co. (Fla. Dec. 19, 1901) 31 So. 265, the court held that "A plaintiff in ejectment must recover upon the strength of his own title and not upon the weakness of his adversaries."

The plaintiff must recover, if at all, on the strength of his own title. Wilson v. Parrigo, 155 Ind. 570; 58 N. E. 847; Creech v. Childers, 166 Mo. 338; 56 S. W. 1106; Smith v. Haskins, 45 At. 741; Stith v. Cobb, Ala. 1900 28

So. 402; Hammond v. Shepard, 57 N. E., 867; (Ill. 1900).

XX.

In Nebraska we have three supreme court judges, and then the legislature provides, from time to time, for the employment of clerks to help the judges. These clerks hear arguments and write opinions. The court proper never knows anything of the contents of these opinions, until they are presented in the consultation room and hurriedly read. These clerks are called commissioners. At the time the opinion was written in this case there were nine of these commissioners. Each set of three commissioners formed a court. The nine commissioners formed three courts, and the three judges formed a fourth court. There would be four courts or departments hearing arguments at once. Because of this method, which seems to be unsatisfactory, the court proper, that is the tribunal formed by the *three judges*, rarely heard arguments, except in the most important cases and in criminal cases. The opinion of the commissioner would be approved and become the opinion of the court *without the court itself, having heard any argument upon the questions involved in the case*, and without the court having *made any personal examination of the authorities cited*. The system is not a good one, but it is a device to enable the court to dispatch the business and seems necessary, because the constitution of 1875, providing for only three judges, was *long ago out-grown*. While the commissioners are selected by the judges from the bar, and generally the Act provides that the three political parties in Nebraska shall be represented, yet there is not that homogeneity, which one might expect from a body of men of equal size, either elected or appointed and remaining *continuously upon the bench for a full term of six years or longer*. It is too much like a husking bee.

XXI.

The Act of Congress recognizing the validity of the settlement upon the Fort Kearney Military Reservation and directing the survey and sale of the land, is contained in the 19th U. S. Statutes at large, page 94, and is as follows:

"Whereas the tract of land in the State of Nebraska, known as the Fort Kearney Military Reservation is no longer needed or used for military purposes, and has been abandoned by the military authorities: Therefore, Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That it shall be the duty of the Secretary of the Interior to cause said tract of land to be surveyed, sectionized and subdivided as other public lands, and after said survey to offer said land to *actual settlers only* at minimum price under and in accordance with the provisions of the Homestead law; Provided, That if any person has *made permanent improvments upon said land*, prior to the first day of June, 1876, (*being an actual settler thereon*) has exhausted his right to make a homestead entry, such person or his heirs may enter one quarter section of said land under the provisions of the Pre-emption laws; and provided further, That the heirs of every deceased person who had made settlement and improvement as above described prior to June 1st, 1876, may complete the pre-emption or Homestead entry of the person to deceased.

Sec. 2. That the sum of Three Thousand Dollars or so much thereof as may be necessary is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, for the purpose of carrying out the provisions of this Act. Approved July 21, 1876."

At the time this Act was passed the country all about the Reservation was fairly well settled. Kearney, the county seat of Buffalo county, within three miles of the reservation, was a thriving town of three thousand people or more. It had a daily newspaper, two weekly newspapers, and two banks and three hotels. It had been the

Junction of the C. B. & Q. R. R. with the Union Pacific Railroad for four years. Gibbon and Lowell were each close to the Reservation and were thriving country towns, each with a population of from four hundred to five hundred people. *Many persons had already settled upon the Reservation, and the Act was passed to encourage more persons to settle upon it.* The Act recites the abandonment for military purposes. The land was, by the express terms of the Act, to be offered *to actual settlers only.* The Act itself recognizes the fact that actual settlers had already gone upon the tract and had made valuable improvements. Were they trespassers? If so, the government was kind to them, because it protected their settlement and their property. That the Act looked to other *settlements* and *other improvemnets*, is beyond question.

XXII.

Sec. 709 of the U. S. Rev. Stat. provides that

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * may be re-examined and reversed or affirmed in the Supreme court upon a writ of error." (See Bates on Fed. Equity Procedure, page 34).

The right of review exists. Cohens v. Virginia, 6 Wheat. 264. Hans v. Louisiana, 134 U. S. 1; Leisy v. Hardin, 165 U. S. 100.

The writ of error was issued to the Supreme court of the state in each of the following cases: Crescent City Etc. Co. v. Butchers' Union Etc. Co., 120 U. S. 141; Lawyers Ed. Book 30, page 614; Glasgow v. Baker, 128 U. S. p. 560; Lawyers Ed. Book 32, page 513; Chicago & Alton R. R. Co. v. Wiggins Perry Co. 119 U. S. 615; Lawyers Ed. Book 30, page 519; Lehigh Water Co. v. Eaton 121 U. S., 388, Lawyers Ed. Book 30, page 1059. New Orleans

Water Works Co. v. Louisiana Sugar Refining Co. 125 U. S., 18, L. Ed. 31, 607; Cregor v. Shelby & R. R. Co. 125 U. S., 39; L. Ed. Book 31, page 675.

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